IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his Capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiffs,	)	
v.	)	Case No. 4:05-CV-329-GKF-SAJ
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DRAW JURY POOL FROM OUTSIDE THE NORTHERN DISTRICT OF OKLAHOMA

Defendants hereby submit this Reply in further support of their Motion to Draw Jury Pool From Outside Northern District of Oklahoma (Dkt. #1180). Defendants will confine this reply to various new matters raised by Plaintiff in its Response (Dkt. #1211).

DEFENDANTS ARE NOT SEEKING AT THIS TIME TO TRANSFER THE CASE TO KANSAS AND MUCH OF PLAINTIFF'S ARGUMENT IS THEREFORE INAPPOSITE

Plaintiff's Response has something of a ships-passing-in-the-night quality. Much of Plaintiff's Response is dedicated to the proposition that the Court lacks authority to transfer this case to the District of Kansas under 28 U.S.C. § 1404. Defendants have not at this time asked the Court to transfer the case to the District of Kansas under § 1404 or otherwise. That would account for the lack of any analysis or discussion in Defendants' motion of the various factors considered under a conventional § 1404 transfer situation. Defendants suspect Plaintiff spent much of the Response discussing relief which Defendants have not requested, under a statute Defendants have not invoked, because Plaintiff had little of substance to say about the request Defendants *actually made.*[1]

The various cases Plaintiff discusses that involve a normal transfer of a case from one district to another do not figure into the question actually involved here. Plaintiff cites authority like *United States v. 11 Cases, Etc.*, 94 F. Supp. 925 (D. Or. 1950) (declining to transfer a libel against misbranded/adulterated goods to another district when the court had jurisdiction of the res, the seized goods); *Felchin v. American Smelting & Refining Co.*, 136 F. Supp. 577 (S.D. Cal. 1955) (declining to transfer per § 1404 when a foreign executor would have no power to proceed in the transferee

[1] Plaintiff argues that the Court has no authority to draw a jury pool from outside the Northern District of Oklahoma, citing 28 U.S.C. § 1861 and LCvR 47.1. That statute and local rule discuss a litigant's right to a fair jury selected from a cross section of the community. Plaintiff seems to be saying it is entitled to the benefits of a local jury and the Court has no authority to override its preference. Defendants are aware of the rules and the usual practices; they are requesting relief from those usual practices to protect Defendants' Constitutional rights. The Constitution provides ample authority for the Court.

district); and *General Electric Co. v. Central Transit Warehouse*, 127 F. Supp. 817 (W.D. Mo. 1955) (originally declining to transfer per § 1404 because no venue or personal jurisdiction in transferee district, but reconsidering and transferring). Plaintiff cites these cases for the idea that a transfer under § 1404 has to comply with that statute's requirements. Plaintiff also cites more recent cases like *Watkins v. Crescent Enterprises*, 314 F. Supp. 2d 1156 (N.D. Okla. 2004) (opinion by Magistrate Judge Joyner weighing § 1404 factors and declining to transfer); *Ni Fuel Co., Inc. v. Jackson*, 257 B.R. 600 (N.D. Okla. 2000) (Judge Burrage adopting Magistrate Judge Joyner's Report and Recommendation, which recommended against transfer under a § 1404 analysis) and *In re United States Lines, Inc.*, 216 F.3d 228 (2nd Cir. 2000) (holding that the court could not transfer claims under § 1404 when there was no civil action pending to transfer). Plaintiff relies on these cases for the idea that courts routinely deny motions to transfer venue "in the absence of a strictly followed venue statute." Response at p. 4. If Defendants were requesting transfer of the case to another district under the authority of § 1404, this authority might merit more lengthy discussion. On the current motion, all of these cases are irrelevant because Defendants have not asked this Court to transfer this case.[2]

Likewise, Plaintiff's claim that there is an insufficient factual record to transfer the case to Kansas is irrelevant. Defendants have not asked the Court to transfer this case

[2] Plaintiff goes off on various tangents like "It is beyond dispute that the requirements of 28 U.S.C. § 1404 could not be satisfied in this case. Indeed, Defendants do not even attempt to do so." Plaintiff's Response at pp. 4-5. Not surprisingly, since Defendants have not asked the Court to transfer this case under 28 U.S.C. § 1404, they have not engaged in any discussion of whether or how they meet the requirements of the statute.

to the District of Kansas. Since no such request is involved in Defendants' motion, Defendants will not address the non-issue in any detail.

Plaintiff also discusses at some length the incorrect argument that, since Defendants are asking the Court to transfer this case to another district, and since such a transfer would cause this Court to lose jurisdiction over the case, the request is premature. Plaintiff cites *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509 (10th Cir. 1991) (noting that transfer to another district under § 1404 must be of the whole case and not just certain claims; once files are physically transferred to the new court, the original district court loses jurisdiction over the case) and *In re Flight Transportation Corp. Securities Litigation*, 764 F.2d 515 (8th Cir. 1985) (district court could not "transfer" 52 cases to another district for trial and still require the parties to continue filing all their papers in the transferor district). Defendants have not asked the Court to transfer the case to the District of Kansas and have not asked the Court to do anything which would divest it of jurisdiction.

UNDER PLAINTIFF'S THEORY OF THE CASE, THIS LAWSUIT REQUESTS RELIEF THAT IS IN THE PERSONAL INTEREST OF EACH POTENTIAL JUROR IN THIS DISTRICT

Plaintiff argues that jurors in this district could not have any implied bias because Plaintiff is not requesting any relief that would really impact these Oklahoma taxpayers or property owners.[3] Plaintiff characterizes the lawsuit as follows:

> The State's First Amended Complaint asserts sovereign, quasi-sovereign and trustee interests under federal and state statutory law and federal and

[3] Plaintiff, in another tangential argument, argues that "Defendants do not suggest actual bias, which may be demonstrated either by express juror admission or a court finding based on the jurors' voir dire answers." Response at p. 6, n.3. Since no potential jurors have been drawn or questioned, it should come as no surprise that Defendants have not asked for any relief based on voir dire responses.

> state common law causes of action; it does not assert the private rights of individual Oklahomans. Indeed, actions brought *parens patriae* cannot be brought "to assert the rights of private individuals." *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (citations omitted). Rather, actions brought *parens patriae* are brought "to prevent or repair harms to [a state's] quasi-sovereign interests." *Id.* (citation and quotations omitted). "In order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest." *Id.* (citation and quotations omitted). "Although the Supreme Court has not expressly defined what is a 'quasi-sovereign' interest, it is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory, or of interstate waters in which the state has rights.'" *Id.* (citation omitted).
> Response at p. 7.

Plaintiff's continued confusion about exactly what it is seeking and on whose behalf is clear in its response to Defendants' motion. Plaintiff's characterization of this lawsuit in response to Defendants' motion is quite different from the actual claims asserted and is contrary to Plaintiffs' claim that it has standing. Review of the recent Second Amended Complaint (Dkt. #1215) makes this clear.

Paragraph 1 of the newest Complaint recites that Plaintiff wishes to recover "damages for the lost value and restoration of the natural resources of the IRW. . . ." Plaintiff claims it "holds all natural resources . . . within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public." Para. 5.

The *Satsky v. Paramount* case upon which Plaintiff relies says clearly that states cannot sue to assert the rights of private individuals under CERCLA or the "*parens patriae*" theory. Yet Plaintiff has attempted to define its CERCLA facility as the entire IRW and requests recovery under nuisance and other theories for property which belongs to private individuals. *See* Second Amended Complaint, ¶¶ 71, 80, 88, 104 and 105. Those private individuals would be located in part in the Northern District of Oklahoma.

Plaintiff's next straw man is the theory that Defendants are claiming every *parens patriae* action is unconstitutional. *See* Response at pp. 7-8. In support of its position that *parens patriae* actions can exist (which Defendants have not disputed), Plaintiff relies on *State ex rel. Pollution Control Coordinating Board v. Kerr-McGee Corp.*, 1980 OK 166. The *Kerr-McGee* case was a state law negligence and statutory case for the cost of restocking a river with fish after an oil spill. A statute granted the right to sue for costs of restocking. Notably, in the *Kerr-McGee* case, the State was suing for something that only the State held in trust (game fish) and was not suing for alleged damages to properties held by private individuals. Thus, *Kerr-McGee* is inapposite to this case, where Plaintiff asserts claims for the entire IRW.

Plaintiff relies on various authorities which take the position mere taxpayer status is insufficient to exclude potential jurors from service. *Wilson v. Morgan*, 477 F.3d 326 (6th Cir. 2007), for example, concluded it was not an abuse of discretion to permit residents of a county to sit on the jury where police officers were being sued and the county could have *respondeat superior* liability, at least where the district court made sure the potential jurors were not informed who would actually pay any judgment against the law enforcement officers. But here, Plaintiff's theory of the case makes each potential juror more than just a taxpayer. Plaintiff is claiming that each and every parcel of property in the IRW has been polluted by poultry litter and is seeking damages and injunctive relief to address that alleged pollution. Thus, under Plaintiff's theory, every resident and property owner in the IRW is an integral part of this case. Other cases upon which Plaintiff relies have concluded that various potential interests by jurors should be addressed by voir dire rather than by § 1404 transfer. *See Boyer v. Board of County*

Commissioners, unpublished, 1995 WL 106346 (D. Kansas) (denying intradistrict transfer under § 1404 analysis; court would address county taxpayer issue in voir dire); *Los Angeles Memorial Coliseum v. National Football League*, 89 FRD 497 (C.D. Cal. 1981) (denying transfer under § 1404 analysis because excessive delay in raising the issue and court preferred to address pretrial publicity and financial interest questions at voir dire); *Virginia Electric and Power Co. v. Sun Shipbuilding*, 389 F. Supp. 568 (E.D. Va. 1975) (declining to transfer under § 1404 when most potential jurors were customers of plaintiff utility - no necessary connection between outcome of trial and any customers' utility rates); *In re Wyoming Tight Sands Antitrust Cases*, 723 F. Supp. 561 (D. Kansas 1988) (declining to transfer under § 1404 because the court would address any financial interest of utility customer jurors in voir dire). As Defendants are not requesting a routine statutory transfer pursuant to § 1404, these cases are not particularly helpful to the question before the Court.[4]

Plaintiff also asks the Court to ignore the blizzard of publicity and editorial comment this case has attracted. Defendants have not based this motion on Plaintiff's extensive pretrial publicity and editorial comment attending this case, although those are a community context of which the Court should be aware. Defendants will evaluate whether Plaintiff's ongoing commentary has biased the jury pool and will file any necessary motions as the trial date nears. It is simply too early to know whether Plaintiff's extensive commentary has caused irreparable bias.

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[4] Neither are the cases cited by Plaintiff at p. 9 which concluded being a utility customer or taxpayer is insufficient "financial interest" to disqualify a district judge from hearing a case. *See In re Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980) (utility customer); *Booth v. Internal Revenue Service*, unpublished, 37 F.3d 1509 (10th Cir. 1994) (taxpayer).

Finally, near the end of its Response, Plaintiff actually addresses authorities cited in the motion. That discussion is limited to the view that those opinions, no matter what they may actually say, "clearly turned largely on the extensive pre-trial publicity. . . ." Response at p. 10. Rather than reargue the original issues in this Reply, Defendants refer the Court to the original Motion papers and more importantly to the cases themselves.

VOIR DIRE IS NOT AN ADEQUATE REMEDY

Plaintiff ends by citing various further authorities for the idea that voir dire is designed to address problems of pretrial publicity or juror bias. The quoted portions of those cases about the value of voir dire in an ordinary case are not particularly controversial. Defendants requested a departure from the ordinary processes in this extraordinary situation, based on our evolving understanding of the practical limits of voir dire and the facts of human psychology. Moreover, voir dire cannot address Plaintiff's theory of the case, which absurdly claims that the entire IRW is a hazardous waste site that has been polluted with poultry litter. Under that theory, no person who lives, works, or recreates in the IRW can be expected to sit on the jury that adjudicates Plaintiff's claims.

Plaintiff complains about Defendants' citation of the 11th Circuit's recent decision in *United States v. Campa*,[5] which followed earlier 11th Circuit authority demonstrating sensible skepticism toward a juror's assurances that he could lay aside his prejudices in deciding a high profile case. A few months later, an *en banc* panel of the 11th Circuit came to a different ultimate conclusion about whether the District Court had abused its discretion in that case, noting that the district court had empanelled the jury without

[5] 419 F.3d 1219

objection and had invited a change of venue motion after the voir dire, but that the defendants had decided not to move for a change of venue at that time. *United States v. Campa*, 459 F.3d 1121, 1137 (11th Cir. 2006). Given that the defendants failed to object to the jury and did not complain when the district court invited such objections, the 11th Circuit's ultimate decision that the district court did not abuse its discretion is understandable. But the 11th Circuit's willingness to look behind a juror's mechanical assurances of fairness, as set forth in the various cases Defendants presented in our opening papers, is a more realistic approach than blind reliance on voir dire.

CONCLUSION

Plaintiff basically ignored the bases of Defendants' motion, responding with cases about § 1404 transfers and the general value of voir dire. Plaintiff did not even address the actual claims raised in Defendants' motion. Plaintiff did not refute its oft-repeated claim that the entire IRW is a hazardous waste site. Accordingly, as set forth in Defendants' opening papers, the potential jurors in this District are themselves beneficiaries of any judgment for Plaintiff, and the Constitution requires jurors for this trial be drawn from outside this District.

Respectfully submitted

s/John R. Elrod
John R. Elrod, AR Bar Number 71026
Vicki Bronson, OK Bar Number 20574
CONNER & WINTERS, LLP
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

and

D. Richard Funk, OK Bar No. 13070
Bruce W. Freeman, OK Bar No. 10812
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, OK 74172-0148
Telephone: (918) 586-5711
Facsimile: (918) 586-8547

ATTORNEYS FOR DEFENDANT
SIMMONS FOODS, INC.

/s/ John H. Tucker
John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker
& Gable, P.L.L.C.
100 West Fifth Street, Suite 400
Tulsa, OK 74121-1100
Counsel for Cargill, Inc. and
Cargill Turkey Production, LLC

/s/ Robert W. George
Robert W. George
Michael R. Bond
Erin W. Thompson
Kutak Rock, LLP
The Three Sisters Building
214 West Dickson
Fayetteville, AR 72701
Counsel for Tyson Foods, Inc.,
Tyson Poultry, Inc., Tyson Chicken,
Inc., and Cobb-Vantress, Inc.

/s/Gary Weeks
Gary Weeks
James W. Graves
Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702-3618
Counsel for George's, Inc. and
George's Farms, Inc.

/s/ A. Scott McDaniel
A. Scott McDaniel
Phillip D. Hixon
Nicole Longwell
McDaniel, Hixon, Longwell & Acord PLLC
320 South Boston Avenue, Suite 700
Tulsa, OK 74103
Counsel for Peterson Farms, Inc.

/s/Jennifer Stockton Griffin
Jennifer Stockton Griffin
Lathrop & Gage LC
314 East High Street
Jefferson City, MO 65101
Counsel for Willow Brook Foods, Inc.

/s/ Robert E. Sanders
Robert E. Sanders
Stephen Williams
Young, Williams, Henderson & Fusilier
P.O. Box 23059
Jackson, MS 39225-3059
Counsel for Cal-Maine Foods, Inc.
and Cal-Maine Farms, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2007, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Douglas Allen Wilson
Joseph P. Lennart
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Robert A. Nance
Dorothy Sharon Gentry
Riggs Abney Neal Turpen
Orbison & Lewis
502 West 6th Street
Tulsa, OK 74119-1010
Counsel for Plaintiff

William H. Narwold
Motley Rice LLC
20 Church Street, 17th Floor
Hartford, CT 06103
Counsel for Plaintiff

Robert W. George
Michael R. Bond
Erin W. Thompson
Kutak Rock, LLP
The Three Sisters Building
214 West Dickson
Fayetteville, AR 72701
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

Thomas C. Green
Mark D. Hopson
Timothy K. Webster
Jay T. Jorgensen
Sidley, Austin Brown & Wood, LLP
1501 K. Street, N.W.
Washington, D.C. 20005-1401
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

James Randall Miller
Louis Werner Bullock
Miller Keffer & Bullock
222 South Kenosha
Tulsa, OK 74120-2421
Counsel for Plaintiff

David P. Page
Bell Legal Group
222 South Kenosha
Tulsa, OK 74120-2421
Counsel for Plaintiff

W.A. Drew Edmondson
Attorney General
Kelly Hunter Burch
J. Trevor Hammons
Tina L. Izadi
Assistant Attorneys General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Counsel for Plaintiff

Elizabeth C. Ward
Frederick C. Baker
Lee M. Heath
Elizabeth Claire Xidis
Motley Rice LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29465
Counsel for Plaintiff

Gary Weeks
James W. Graves
Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702-3618
Counsel for George's, Inc. and George's Farms, Inc.

Randall Eugene Rose
George W. Owens
Owens Law Firm PC
234 West 13th Street
Tulsa, OK 74119-5038
Counsel for George's, Inc. and George's Farms, Inc.

Delmar R. Ehrich
Bruce Jones
Krisann Kleibacker Lee
Faegre & Benson
90 South 7th Street, Suite 2200
Minneapolis, MN 55402-3901
Counsel for Cargill, Inc. and Cargill Turkey Production, LLC

Robert P. Redeman
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC
P.O. Box 1710
Tulsa, OK 74101
Counsel for Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc.

Robert E. Sanders
Stephen Williams
Young, Williams, Henderson & Fusilier
P.O. Box 23059
Jackson, MS 39225-3059
Counsel for Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc.

Patrick M. Ryan
Stephen Jantzen
Paula M. Buchwald
Ryan, Whaley & Coldiron
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C.
100 West Fifth Street, Suite 400
Tulsa, OK 74121-1100
Counsel for Cargill, Inc. and Cargill Turkey Production, LLC.

Terry West
The West Law Firm
124 West Highland Street
Shawnee, OK 74801
Counsel for Cargill, Inc. and Cargill Turkey Production, LLC

A. Scott McDaniel
Phillip D. Hixon
Nicole Longwell
McDaniel Hixon Longwell & Acord
320 South Boston Avenue, Suite 700
Tulsa, OK 74103
Counsel for Peterson Farms, Inc.

Sherry P. Bartley
Mitchell Williams Selig Gates & Woodyard PLLC
425 West Capitol Avenue, Suite 1800
Little Rock, AR 72201-3525
Counsel for Peterson Farms, Inc.

Charles Moulton
Senior Assistant Attorney General
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Counsel for Intervenors, State of Arkansas and Arkansas Natural Resources Commission

Jennifer Stockton Griffin
Lathrop & Gage LC
314 East High Street
Jefferson City, MO 65101
Counsel for Willow Brook Foods, Inc.

Raymond Thomas Lay
Kerr Irvine Rhodes & Ables
201 Robert S. Kerr Avenue, Suite 600
Oklahoma City, OK 73102
Counsel for Willow Brook Farms, Inc.

William B. Federman
Jennifer F. Sherrill
Federman & Sherwood
120 North Robinson, Suite 2720
Oklahoma City, OK 73102
Counsel for Intervnors, State of Arkansas and Arkansas Natural Resources Commission

and I hereby certify that I have mailed the document by the United States Postal Service to the following non CM/ECF participants:

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
Counsel for Plaintiff

Thomas C. Green
Sidley, Austin Brown & Wood, LLP
1501 K. Street, N.W.
Washington, D.C. 20005-1401
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

Dustin McDaniel, Attorney General
Justin Allen, Chief Dep. Attorney General
Jim DePriest, Dep. Attorney General
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Counsel for Intervenors, State of Arkansas and Arkansas Natural Resources Commission

s/John R. Elrod
John R. Elrod